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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

FREE KICK MASTER, LLC,

PLAINTIFF,

VS.

APPLE, INC, ET AL.,

DEFENDANT.

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) NO. C 15-3403 PJH

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) OAKLAND, CALIFORNIA

)

) WEDNESDAY

)

) SEPTEMBER 30, 2015

)

) 9:00 O'CLOCK A.M.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

VAL SCHUROWLIEW, ESQUIRE

STANLEY L. JOSSELSO, ESQUIRE

1276 WEST 3RD STREET, #411

CLEVELAND, OHIO 44113

AND

EUGENE ALKANA, ESQUIRE

131 N EL MOLINO AVENUE #310

PASADENA, CALIFORNIA 91101

FURTHER APPEARANCES ON NEXT PAGE

REPORTED BY: KATHERINE WYATT, CSR 9866, RMR, RPR

COMPUTERIZED TRANSCRIPTION BY ECLIPSE

1 **FURTHER APPEARANCES:**

2 **FOR THE SAMSUNG DEFENDANTS:**

3 **ARNOLD & PORTER LLP**

4 777 SOUTH FIGUEROA STREET 44TH FLOOR

5 LOS ANGELES, CALIFORNIA 90017

6 **BY: JOHN ULIN, ESQUIRE**

7 **FOR THE GOOGLE AND AMAZON DEFENDANTS:**

8 **DURIE TANGRI LLP**

9 217 LEIDESDORFF STREET

10 SAN FRANCISCO, CALIFORNIA 94111

11 **BY: MICHAEL H. PAGE, ESQUIRE**

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1 **SEPTEMBER 30, 2015**

9:00 O'CLOCK A.M.

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3 **P R O C E E D I N G S**

4 **THE CLERK:** CALLING CIVIL CASE NUMBER 15-3403, FREE
5 KICK MASTER VERSUS APPLE INCORPORATED.

6 COUNSELS, PLEASE STEP FORWARD AND STATE YOUR APPEARANCES.

7 **MR. PAGE:** GOOD MORNING, YOUR HONOR. MICHAEL PAGE FOR
8 GOGGLE AND AMAZON.

9 **THE COURT:** GOOD MORNING. WHERE IS EVERYONE?

10 **MR. PAGE:** IT'S AN INTERESTING QUESTION. WE HAVEN'T
11 HEARD FROM THEM.

12 **MR. ULIN:** THAT IS A GOOD QUESTION.

13 **THE COURT:** WELL, THEY CHECKED IN. WE HAVE NAMES DOWN.

14 **MR. PAGE:** FREE KICK? YOU GUYS FROM FREE KICK?

15 **MR. SCHUROWLIEW:** YES.

16 **MR. PAGE:** YOU'RE UP.

17 **MR. ULIN:** GOOD MORNING, YOUR HONOR. I'M JOHN ULIN
18 FROM ARNOLD & PORTER FOR THE DEFENDANT AND MOVING PARTY SAMSUNG
19 ELECTRONICS AMERICA.

20 **THE COURT:** ALL RIGHT. SO YOU ALL ARE REPRESENTING THE
21 DEFENSE?

22 **MR. PAGE:** YES.

23 **THE COURT:** ALL RIGHT. YOU ALL ARE ON THIS SIDE.
24 PLAINTIFF'S COUNSEL, IF YOU'LL COME FORWARD, PLEASE.

25 **MR. ALKANA:** GOOD MORNING, YOUR HONOR. EUGENE ALKANA

1 APPEARING ON BEHALF OF PLAINTIFF.

2 **THE COURT:** FREE KICK MASTER.

3 **MR. ALKANA:** YES, YOUR HONOR. I DIDN'T HEAR IN THE
4 BACK. I'M SORRY.

5 **THE COURT:** THAT'S ALL RIGHT.

6 WHO ELSE IS HERE?

7 **MR. SCHUROWLIEW:** VAL SCHUROWLIEW ASSISTING STANLEY
8 JOSSELSOON ALSO ON BEHALF OF FREE KICK MASTER.

9 **THE COURT:** ALL RIGHT. GOOD MORNING.

10 **MR. JOSSELSOON:** YOUR HONOR, GOOD MORNING. I'M STANLEY
11 JOSSELSOON. WE ARE OUT OF CLEVELAND.

12 **THE COURT:** ALL RIGHT, GOOD MORNING. WE'RE HERE THIS
13 MORNING ON THE DEFENDANTS' MOTIONS TO DISMISS. WE'LL START FIRST
14 WITH AMAZON AND GOOGLE'S MOTION. AS I UNDERSTAND IT, APPLE IS
15 NOT MOVING; HAS ANSWERED AND IS NOT PART OF THIS MOTION.
16 CORRECT?

17 **MR. PAGE:** THAT'S CORRECT, YOUR HONOR. ALTHOUGH THEIR
18 COUNSEL IS HERE, IF YOU HAVE ANY QUESTIONS FOR THEM.

19 **THE COURT:** COUNSEL FOR APPLE, YOU CAN COME FORWARD, IF
20 YOU WANT. YOU CAN PERHAPS HEAR BETTER. YOU'RE WELCOME TO SIT AT
21 THE DEFENSE TABLE.

22 ALL RIGHT. NOW, WE DO HAVE A JOINT MOTION FILED BY AMAZON
23 AND GOOGLE AND SAMSUNG HAS FILED AN INDIVIDUAL MOTION. WE'LL
24 START FIRST WITH YOURS.

25 **MR. PAGE:** OKAY, YOUR HONOR. THANK YOU.

1 WE SEE THIS AS A VERY SIMPLE CASE. THERE ARE BASICALLY
2 THREE DIFFERENT TRANCHES OF CLAIMS THE FIRST IS AN CONTRIBUTORY
3 TRADEMARK CLAIM. THE LAW'S VERY CLEAR THAT IN ORDER TO STATE A
4 CONTRIBUTORY TRADEMARK INFRINGEMENT CLAIM ONE MUST ALLEGE THAT
5 THE CONTRIBUTORY INFRINGER CONTINUED TO PROVIDE SUPPORT OR
6 SERVICES TO THE INFRINGER WITH KNOWLEDGE OF THE INFRINGEMENT.

7 IN THE INTERNET SPACE ALL OF OUR CLIENTS, ALL OF THE MAJOR
8 ISPS DEAL WITH THIS PRETTY STRAIGHTFORWARDLY. WE ALL HAVE
9 TRADEMARK NOTIFICATION SYSTEMS. WHEN SOMEONE NOTIFIES US HAVE AN
10 ALLEGED INFRINGEMENT WE REACT BY TAKING DOWN THE INFRINGING WORK
11 AND NOTIFY THE PERSON WHO POSTED IT.

12 IF THAT PERSON GIVES US A COUNTERNOTIFICATION SAYING:

13 "NO, I'M LICENSED," OR "NO, IT'S NOT AN INFRINGEMENT,"
14 WE'LL PUT IT BACK UP. WE BASICALLY TREAT IT LIKE A DMCA NOTICE.
15 AND THEN, THEY CAN FIGHT IT OUT IN COURT.

16 BUT ISPS ARE IN NO POSITION TO KNOW WHETHER ANY PARTICULAR
17 WORK, BE IT AN APP IN THIS CASE, OR A SONG OR A MOVIE INFRINGES
18 ANYONE'S TRADEMARK RIGHTS. YOU KNOW, WE'RE NOT IN A POSITION TO
19 SEARCH FOR THE RIGHTS. WE'RE NOT IN A POSITION TO MAKE A
20 DETERMINATION WHETHER THE WORK FALLS WITHIN THE CLASSES FOR WHICH
21 THE WORK IS REGISTERED. IN THIS CASE IT DOES NOT. WE'RE IN NO
22 POSITION TO KNOW WHETHER THEY HAVE LICENSED THE USE. WE CAN'T
23 JUST WILLY-NILLY TAKE DOWN WORKS, AND THEN TURN AROUND AND FIND
24 OUT THAT WE'VE INTERFERED WITH A CONTRACTUAL RELATION WHEN THE
25 PERSON WHOSE WORK WE TOOK DOWN SAYS:

1 "WAIT A MINUTE. I BOUGHT THE TRADEMARK AND I LICENSED
2 IT, AND YOU SHUT DOWN MY BUSINESS."

3 SO IN ORDER TO STATE A CLAIM FOR CONTRIBUTORY TRADEMARK
4 INFRINGEMENT YOU HAVE TO SAY THAT YOU GAVE THE ISP NOTICE, AND
5 THEY IGNORED IT.

6 AND IN THIS CASE, NO NOTICE WAS GIVEN. NO NOTICE IS PLED.
7 THERE ARE NO FACTS ALLEGED WHATSOEVER TO ESTABLISH THAT EITHER
8 GOGGLE OR AMAZON HAD ANY KNOWLEDGE, EITHER OF THE EXISTENCE OF
9 THE TRADEMARK, OR OF THE CLAIM THAT THESE WORKS THAT WERE
10 ALLEGEDLY POSTED BY THIRD PARTIES ON OUR SITES INFRINGE THOSE
11 TRADEMARKS.

12 THERE IS A SINGLE ALLEGATION IN THE COMPLAINT THAT SAYS THAT
13 THE PLAINTIFFS TRIED TO CONTACT THE ISPS. BUT THEN IT CITES ONLY
14 TO A LETTER TO SAMSUNG ABOUT A TOTALLY UNRELATED ISSUE. THERE IS
15 NO ALLEGATION THAT WE EITHER GOT NOTICE FROM THE PLAINTIFFS OR
16 OBTAINED KNOWLEDGE IN ANY OTHER WAY. IN OPPOSITION ALL THEY CAN
17 SAY ON THIS POINT IS, AS I BELIEVE I DESCRIBED IT,
18 "BREATHTAKINGLY CIRCULAR," WHICH IS THAT THE COMPLAINT SAYS OUR
19 ACTIONS WERE WILLFUL. AND SINCE IT SAYS THEY WERE WILLFUL THERE
20 MUST BE FACTS THAT CAUSED IT TO BE WILLFUL.

21 BUT THERE ARE NO FACTS ALLEGED. IT'S LIKE THE EXACT FLIP OF
22 IQBAL AND TWOMBLY. IT'S LIKE IF I STATE THE CONCLUSION YOU MUST
23 ASSUME THAT THERE EXISTS FACTS IN THE WORLD THAT WOULD LEAD A
24 TRYER OF FACT TO THAT CONCLUSION. IT'S ENTIRELY BACKWARDS. YOU
25 CAN'T JUST SAY IT WAS WILLFUL WITHOUT STATING ANY FACTS TO

1 SUPPORT IT.

2 SO WE BELIEVE THE CONTRIBUTORY TRADEMARK CLAIM GOES AWAY.

3 THE NEXT ONE IS A CLAIM NOR INJUNCTION. THERE IS NO SUCH
4 THING. IT'S A REMEDY, NOT A CLAIM.

5 AND THEN THE THIRD SET ARE THREE --

6 **THE COURT:** YOU KEEP REFERRING TO IT AS A CONTRIBUTORY
7 TRADEMARK CLAIM. PLAINTIFF REFERS TO IT AS A TRADEMARK CLAIM.
8 AND, INDEED, LOOKING AT THE COMPLAINT IT JUST SAYS "TRADEMARK
9 INFRINGEMENT."

10 **MR. PAGE:** CONTRIBUTORY TRADEMARK INFRINGEMENT IS A
11 FLAVOR OF TRADEMARK INFRINGEMENT. YOU CAN CALL IT WHATEVER YOU
12 WANT, BUT THERE'S NO ALLEGATION THAT EITHER GOGGLE OR AMAZON
13 BRANDED ANY PRODUCTS WITH THIS NAME OR USED THIS NAME IN
14 COMMERCE.

15 THE ONLY ALLEGATION IS THAT SOMEONE ELSE CALLED THEIR
16 APPLICATION THIS, AND THEN PLACED IT ON OUR WEBSITE.

17 THEY DON'T DISPUTE IN THEIR OPPOSITION THAT IT'S A
18 CONTRIBUTORY TRADEMARK CLAIM.

19 **THE COURT:** ALL RIGHT.

20 **MR. PAGE:** IT CLEARLY IS.

21 **THE COURT:** YOU'RE JUST CONSTRUING, THOUGH, THE FIRST
22 CAUSE OF ACTION WHICH DOESN'T USE THAT WORD AS "CONTRIBUTORY."

23 **MR. PAGE:** RIGHT. IT'S ALL IT CAN BE. THERE'S NO
24 ALLEGATIONS THAT WE EVER USED THE MARK IN ANY WAY. JUST THAT THE
25 THIRD PARTIES USED IT ON PRODUCTS THEY CREATED AND THEN PUT UP

1 FOR SALE ON OUR WEBSITES.

2 AND THEN, THE THIRD TRANCHE ARE THREE STATE LAW CLAIMS WHICH
3 ARE BARRED BY CDA SECTION 230. UNDER CC BILL, ALL NONFEDERAL IP
4 CLAIMS AGAINST ISPS ARE BARRED TO THE EXTENT THAT THEY SEEK TO
5 HOLD THE ISP RESPONSIBLE FOR THE SPEECH OR ACTS OF A THIRD PARTY.
6 AND THAT'S EXACTLY WHAT WE HAVE HERE. THIRD PARTIES ALLEGEDLY
7 USED THEIR MARK ON PRODUCTS AND POSTED THEM ON OUR WEBSITE.

8 THOSE CLAIMS ARE BARRED BY THE CDA. THE OPPOSITION, QUITE
9 FRANKLY, SORT OF WANDERS OFF INTO LANHAM ACT PREEMPTION AND A
10 DISCUSSION OF THE FACT THAT STATE AND FEDERAL TRADEMARK RULES ARE
11 SIMILAR. BUT NONE OF THAT HAS ANYTHING TO DO WITH SECTION 230
12 PREEMPTION.

13 I MEAN, THIS IS -- I THINK THE CLOSEST CASE ON THIS WOULD BE
14 ACTUALLY MY OWN, THE CHUBBY CHECKER CASE IN FRONT OF JUDGE ALSUP
15 WHERE A MUCH MORE FAMOUS MARK WAS USED ON AN APP THAT WAS POSTED
16 TO PALM'S STORE. ALL OF THE SAME ARGUMENTS WERE MADE THAT, YOU
17 KNOW, THE APP STORES PROVIDE GUIDELINES. AND STKS TO HELP PEOPLE
18 WRITE APPS AND RULES AND THEY POLICE THEIR SITES.

19 NONE OF THAT VITIATES SECTION 230 IMMUNITY. THE BOTTOM LINE
20 IS IF WE DIDN'T WRITE IT AND WE DIDN'T -- AND WE DIDN'T NAME IT
21 AND WE DIDN'T -- WE CAN'T BE HELD LIABLE UNDER ANY STATE CLAIMS.

22 **THE COURT:** ALL RIGHT. AND WITH REGARD TO THE THIRD
23 CAUSE OF ACTION WHICH YOU DIDN'T ADDRESS I ASSUME IT'S A
24 INJUNCTIVE RELIEF CLAIM.

25 **MR. PAGE:** YES. IT'S NOT A CAUSE OF ACTION. IT'S A

1 REMEDY.

2 **THE COURT:** OKAY.

3 **MR. PAGE:** THE OTHER, JUST FOR THE RECORD, ALSO, WE
4 WOULD OBJECT TO THE DEGREE THAT THEIR OPPOSITION RELIES LARGELY
5 ON MATERIAL THAT'S NOT IN THE COMPLAINT.

6 **THE COURT:** OKAY. ALL RIGHT. PLAINTIFF'S COUNSEL?

7 **MR. SCHUROWLIEW:** YOUR HONOR, VAL SCHUROWLIEW,
8 S-C-H-U-R-O-W-L-I-E-W. I WORK WITH STANLEY LOUIS JOSSELSOON AT
9 STANLEY JOSSELSOON COMPANY LPA IN CLEVELAND, OHIO. AND I'M HERE
10 ON BEHALF OF PLAINTIFF FREE KICK MASTER. AND I'M RESPONDING TO
11 THE MOTION FILED BY GOGGLE AMAZON.

12 OKAY. AS THE GENTLEMAN THAT PRECEDED ME STATED THAT THE
13 COMPLAINT DID NOT ALLEGE ANY KIND OF KNOWLEDGE. WELL, THERE'S
14 ACTUALLY FOUR SECTIONS IN THE COMPLAINT THAT ACTUALLY DO.

15 I WOULD DIRECT THE COURT'S ATTENTION, IF WOULD IT PLEASE, TO
16 COUNT NUMBER 23, WHICH IS DEFENDANTS' APPLE, AMAZON, GOOGLE AND
17 SAMSUNG'S --

18 **THE COURT:** EXCUSE ME. EXCUSE ME. COUNT NUMBER 23?

19 **MR. SCHUROWLIEW:** YEAH. IT'S PARAGRAPH NUMBER 23 OF
20 THE SECOND-AMENDED COMPLAINT. IT'S BASICALLY FOUR DIFFERENT
21 PARAGRAPHS. THERE'S PARAGRAPH 23, 33, 36 AND 41. AND
22 PLAINTIFF --

23 **THE COURT:** COULD YOU GO THROUGH THOSE NUMBERS A LITTLE
24 MORE SLOWLY?

25 **MR. SCHUROWLIEW:** SURE. OKAY. PLAINTIFF - LET'S SEE,

1 23 STATES THAT THE USE OF THE TRADEMARK WAS WITHOUT CONSENT OF
2 THE PLAINTIFF. PLAINTIFF NEVER CONSENTED TO ANYTHING.

3 PLAINTIFF KNEW THAT THE DEFENDANTS, INCLUDING GOGGLE AND
4 AMAZON, WERE -- AND GOGGLE AMAZON AND SAMSUNG, FOR THAT MATTER --
5 WERE USING THE TRADEMARK.

6 NUMBER 33 STATES THAT THEY WILL CONTINUE TO USE IT.
7 ATTEMPTS TO COMMUNICATE. FOR EXAMPLE, WE GAVE ONLY AN EXAMPLE OF
8 DEFENDANT SAMSUNG. BUT I'M SURE WITH FURTHER DISCOVERY WE WILL
9 BE ABLE TO FIND OTHER INSTANCES OF COMMUNICATION WITH THE OTHER
10 DEFENDANTS.

11 THIS IS, YOUR HONOR, NOT A MOTION FOR SUMMARY JUDGMENT.
12 THIS IS A PLEADING. AND WE HAVE TRIED TO, WITH MANY SUPPLEMENTS
13 AND MANY EXHIBITS, AS YOU HAVE SEEN, TO SUPPLEMENT IT AS MUCH AS
14 WE CAN.

15 THE OTHER PARAGRAPH --

16 **THE COURT:** WHAT DO YOU --

17 **MR. SCHUROWLIEW:** WHAT WE'RE BASICALLY SAYING IS THAT
18 WE --

19 **THE COURT:** EXCUSE ME. LET ME ASK A QUESTION.

20 **MR. SCHUROWLIEW:** I'M SORRY.

21 **THE COURT:** YOU BROUGHT UP THE ISSUE THAT THIS IS NOT A
22 MOTION FOR SUMMARY JUDGMENT.

23 **MR. SCHUROWLIEW:** RIGHT.

24 **THE COURT:** YET THERE ARE STACKS OF PAPERS THAT HAVE
25 BEEN APPENDED NOT ONLY TO THE COMPLAINT --

1 **MR. SCHUROWLIEW:** RIGHT.

2 **THE COURT:** -- BUT TO YOUR BRIEF, WHICH IS A LITTLE
3 UNUSUAL --

4 **MR. SCHUROWLIEW:** RIGHT.

5 **THE COURT:** -- BECAUSE THE BRIEF DOESN'T AUTHENTICATE
6 THE EXHIBITS.

7 **MR. SCHUROWLIEW:** RIGHT.

8 **THE COURT:** IT'S NOT ATTACHED ORDER A DECLARATION.

9 **MR. SCHUROWLIEW:** RIGHT.

10 **THE COURT:** THIS IS A MOTION FOR A RULING ON THE
11 PLEADINGS. WHY IS IT THAT I SHOULD EVEN CONSIDER THESE DOZENS OF
12 EXHIBITS THAT YOU'VE ATTACHED?

13 **MR. SCHUROWLIEW:** WELL, THE PLAINTIFFS HAVE
14 STATED -- I'M SORRY -- THE DEFENDANTS HAVE STATED WE HAVE NOT
15 COMPLIED WITH THE REQUIREMENTS OF IQBAL AND -- ASHCROFT AND
16 IQBAL. AND WE'RE SIMPLY SAYING THAT THERE EXISTS THIS EVIDENCE
17 THAT WE WILL BE ABLE LATER TO PRODUCE THAT SUBSTANTIATES OUR
18 COMPLAINT.

19 **THE COURT:** BUT IQBAL AND TWOMBLY DON'T CONTEMPLATE
20 THAT YOU'LL BE ABLE TO APPEND EXHIBITS THAT WILL TAKE THE PLACE
21 OF PLEADING FACTS. AND WE'RE TALKING TWO DIFFERENT THINGS. YOU
22 HAVE AN EVIDENTIARY PROBLEM. YOU'VE ATTACHED A BUNCH OF THINGS
23 TO YOUR --

24 **MR. SCHUROWLIEW:** RIGHT.

25 **THE COURT:** -- COMPLAINT. YOU'VE ALSO ATTACHED A BUNCH

1 OF THINGS YOUR OPPOSITION. AND IT SEEMS TO ME THAT THOSE ARE THE
2 ONES YOU ARE RELYING UPON TO SHOW KNOWLEDGE, THE ONES YOU'VE
3 ATTACHED TO YOUR BRIEF. HOW ARE THOSE ADMISSIBLE? UNDER WHAT
4 RULE OF EVIDENCE WOULD THOSE BE ADMISSIBLE ON THIS MOTION?

5 AND, STANDING ALONE, WHY ARE THEY ADMISSIBLE SIMPLY BECAUSE
6 THEY ARE STAPLED TO A BRIEF WITH NO AUTHENTICATING DECLARATION?

7 **MR. SCHUROWLIEW:** WELL, YOU ARE ABSOLUTELY RIGHT ABOUT
8 THAT, YOUR HONOR. BUT THEY ARE PROVIDED AS EXAMPLES RATHER THAN
9 AS -- TO STATE THAT WE ARE ABLE TO OBTAIN DISCOVERY WHEN THE TIME
10 COMES IN ORDER TO PROVIDE EVIDENCE THAT THEY DID KNOW, THAT THE
11 DEFENDANTS DID KNOW ABOUT ALL OF THESE THINGS.

12 **THE COURT:** THAT DOESN'T MAKE THEM ADMISSIBLE.

13 **MR. SCHUROWLIEW:** RIGHT.

14 **THE COURT:** I CANNOT RELY UPON SOMETHING THAT IS SIMPLY
15 ATTACHED TO YOUR BRIEF.

16 **MR. SCHUROWLIEW:** RIGHT. WELL, IN ANY CASE --

17 **THE COURT:** YOU NEED TO MAKE YOUR ARGUMENT WITHOUT
18 REFERENCE TO THOSE DOCUMENTS.

19 **MR. SCHUROWLIEW:** RIGHT. WELL, WHAT I'M DOING AT THIS
20 POINT, YOUR HONOR, IS SIMPLY CITING THE PARAGRAPHS OF THE
21 COMPLAINT WHERE WE DO ALLEGE KNOWLEDGE ON THE PART OF THE
22 DEFENDANTS.

23 AND THOSE PARAGRAPHS WOULD BE 23, AS I STATED, 33, WHICH
24 SAYS THAT THE PLAINTIFFS HAVE ATTEMPTED TO COMMUNICATE AS AN
25 EXAMPLE WITH DEFENDANT SAMSUNG. THEIR ATTEMPTS TO COMMUNICATE

1 HAVE BEEN IGNORED.

2 WE ALSO PROVIDED A STATEMENT IN --

3 **THE COURT:** THIS IS AMAZON AND GOGGLE'S MOTION.

4 **MR. SCHUROWLIEW:** RIGHT.

5 **THE COURT:** SO WE'RE NOT TALKING ABOUT SAMSUNG YET.

6 **MR. SCHUROWLIEW:** RIGHT. I UNDERSTAND THAT. BUT

7 SIMILAR TO SAMSUNG, THE PLAINTIFF HAS MADE ATTEMPTS TO

8 COMMUNICATE WITH GOGGLE AND AMAZON.

9 **THE COURT:** IS THAT ALLEGATION IN THE COMPLAINT?

10 **MR. SCHUROWLIEW:** WELL, IF I MAY READ IT.

11 **THE COURT:** JUST TELL --

12 **MR. SCHUROWLIEW:** "ATTEMPTS TO COMMUNICATE WITH

13 DEFENDANTS HAVE BEEN FRUITLESS. PLAINTIFF'S ATTEMPTS TO

14 COMMUNICATE FOR" -- AND THEN, IN QUOTES -- IN PARENTHESES:

15 "FOR EXAMPLE, WITH DEFENDANT SAMSUNG, EXHIBIT 18 HAVE
16 BEEN IGNORED. PLAINTIFF HAS GOOD REASON TO BELIEVE THAT ALL
17 THE DEFENDANTS WILL CONTINUE ADVERTISING, SELLING AND EVEN
18 PROVIDING FREE DOWNLOADS OF FREE KICK MASTER FOR THE
19 FORESEEABLE FUTURE."

20 **THE COURT:** AND THAT'S FROM PARAGRAPH 33?

21 **MR. SCHUROWLIEW:** THAT'S PARAGRAPH 33 OF THE
22 SECOND-AMENDED COMPLAINT. I'M LOOKING RIGHT AT IT.

23 **THE COURT:** OKAY.

24 **MR. SCHUROWLIEW:** AND THEN, PARAGRAPH 36, IF I MAY READ
25 IT TO YOUR HONOR:

1 "UPON INFORMATION AND BELIEF DEFENDANTS' ACTS HAVE BEEN
2 WILLFUL, DELIBERATE AND INTENDED TO INTERFERE."

3 **THE COURT:** A LITTLE MORE SLOWLY.

4 **MR. SCHUROWLIEW:** I'M SORRY. OKAY.

5 "DEFENDANTS' ACTS HAVE BEEN WILLFUL, DELIBERATE AND
6 INTENDED TO INTERFERE WITH PLAINTIFF'S USE AND INTENDED USE
7 OF THE FREE KICK MASTER MARK. TO ADD INSULT TO INJURY THE
8 DOWNLOADS HAVE BEEN OFFERED AT NO COST."

9 INTENT AND WILLFULNESS AND DELIBERATENESS CERTAINLY IMPLIES
10 KNOWLEDGE.

11 **THE COURT:** OKAY.

12 **MR. SCHUROWLIEW:** OKAY? AND, FINALLY, 41, IS:

13 "THE PUBLIC AND OTHERS ARE LIKELY TO BELIEVE THAT
14 DEFENDANTS' GOODS AND SERVICES ARE PROVIDED BY, SPONSORED
15 BY, APPROVED BY, LICENSED BY, AFFILIATED WITH OR IN SOME WAY
16 LEGITIMATELY CONNECTED WITH THE PLAINTIFF WHICH HAS CAUSED
17 OR WILL CAUSE DAMAGE AND INJURY TO THE PLAINTIFF IN TERMS OF
18 ITS ABILITY TO THE PROMOTE ITS SPORTING EVENTS AND VARIOUS
19 COMPUTER APPS AND GAMES DERIVED THEREFROM."

20 THE OTHER THING IS THAT WE HAVE LATELY DISCOVERED -- AND
21 THIS, AGAIN, IS PROBABLY NOT RELEVANT, BUT WE DISCOVERED THAT
22 THEY ALSO USED THE PLAINTIFFS' -- THE PLAYERS' LIKENESSES AND
23 THEIR NAMES IN SOME OF THEIR PRODUCTS THAT THEY HAVE -- THAT
24 GOGGLE HAS ADVERTISED, THAT GOGGLE AND AMAZON HAVE ADVERTISED.

25 SO IT'S PROBABLY NOT RELEVANT AT THIS POINT, BUT I THOUGHT I

1 WOULD JUST BRING THAT UP.

2 THE OTHER THING THAT THEY -- WHAT WE'D LIKE ALSO TO SAY
3 ABOUT THE SECOND POINT ABOUT THE INJUNCTIVE RELIEF, THE
4 DEFENDANTS ARE CORRECT. THE INJUNCTIVE RELIEF IS NOT A SEPARATE
5 COUNT, IN AND OF ITSELF, AND THAT GOES WITH OTHER COUNTS. SO
6 THAT'S SOMETHING THAT THEY ARE CORRECT ABOUT.

7 HOWEVER, WE DON'T BELIEVE THAT THEY ARE CORRECT ABOUT THE
8 CDA, THEIR POSITION ON THE CDA. CDA WAS ORIGINALLY -- THE
9 COMMUNICATIONS DECENCY ACT WAS ORIGINALLY ENACTED TO PROMOTE IN
10 ORDER FOR PROVIDERS OF INTERNET SERVICES, IN ORDER FOR THEM TO BE
11 ABLE TO CLEAN UP WHATEVER THIRD PARTIES POST ON THEIR WEBSITE
12 WITHOUT ANY KIND OF REPERCUSSIONS.

13 AND SO IN ORDER TO PROMOTE -- IN ORDER TO PROMOTE FREEDOM OF
14 EXPRESSION THE CONGRESS DECIDED THAT -- OBVIOUSLY THE CONGRESS
15 DECIDED THAT IT WAS GOING TO ALLOW THE INTERNET PROVIDERS NOT TO
16 HAVE ANY LIABILITY FOR POSTINGS MADE BY THIRD PARTIES.

17 HOWEVER, THIS CASE IS NOT JUST A MATTER OF POSTINGS BEING
18 MADE BY THIRD PARTIES. THIS IS A CASE THAT INVOLVES POSTINGS BY
19 THIRD PARTIES WITH GOOGLE AND AMAZON MAKING MONEY ON THESE
20 POSTINGS.

21 THE DEFENDANTS WOULD CLAIM THAT THINGS ARE POSTED AND GOGGLE
22 AND AMAZON HAVE NO CONTROL OVER ANYTHING. THAT THINGS ARE SIMPLY
23 POSTED, AND THEY JUST STAY THERE. AND THEN, WHEN GOGGLE AND
24 AMAZON ARE NOTIFIED ABOUT THINGS, AS FROM WHAT I COULD UNDERSTAND
25 FROM WHAT THE GENTLEMAN PRIOR TO ME STATED, THEY HAVE NO CONTROL

1 OVER ANYTHING.

2 IT'S JUST POSTED SORT OF LIKE THE THRIFT STORE OF APPS. BUT
3 QUITE TO THE CONTRARY, GOGGLE AND AMAZON HAVE VERY STRICT
4 PROCEDURES BY WHICH THEY VET AND LOOK OVER THINGS THAT THEY POST.

5 IT WOULD BE COMPLETELY UNIMAGINABLE THAT THEY WOULD POST
6 JUST RANDOM THINGS IN THEIR APP STORES AND HAVE PEOPLE COME IN
7 AND JUST BUY THESE THINGS WITHOUT ACTUALLY GOING THROUGH THEM AND
8 SEEING THAT THEY MEET APPROPRIATE STANDARDS.

9 **THE COURT:** ARE THERE FACTS ALLEGED IN THE COMPLAINT
10 THAT, INDEED, THERE WAS SOME SORT OF VETTING PROCESS? ARE YOU
11 SUGGESTING THAT THEY VETTED THIS APP AND SHOULD HAVE KNOWN THAT
12 THE APP WAS AN INFRINGING USE OF YOUR CLIENT'S MARK?

13 **MR. SCHUROWLIEW:** AND, WELL --

14 **THE COURT:** CAN YOU ANSWER THAT QUESTION?

15 **MR. SCHUROWLIEW:** WELL, THE FIRST THING IS THAT THE
16 FEDERAL GOVERNMENT'S WEBSITE DOES CONTAIN THE TRADEMARK. SO IF
17 WE COULD GO IN AND LOOK IT UP IN 30 SECONDS, THEY COULD DO IT, AS
18 WELL.

19 NOW, CLEARLY THE SECOND-AMENDED COMPLAINT DID NOT CONTAIN
20 VERY MUCH OF ANYTHING AT ALL ABOUT THE SPECIFIC VETTING PROCESS
21 THAT THESE DEFENDANTS GO THROUGH.

22 **THE COURT:** ARE THERE ANY FACTS THAT WOULD -- THAT
23 ASSERT THAT YOUR CLIENT NOTIFIED AMAZON AND GOOGLE THAT THE MARKS
24 WERE APPEARING ON THEIR WEBSITE AND WERE INFRINGING OF YOUR
25 CLIENT'S MARK?

1 **MR. SCHUROWLIEW:** I PERSONALLY DON'T KNOW OF ANY AT
2 THIS POINT EXCEPT FOR WHAT IS STATED IN THE COMPLAINT. BUT I'M
3 SURE WE COULD FIND OTHERS WHEN WE LOOK.

4 I PERSONALLY DON'T KNOW OF ANY MYSELF AT THIS POINT. AND I
5 HAVE TO BE HONEST WITH YOU, I DON'T.

6 **THE COURT:** WELL, YOU DESCRIBE ATTEMPTS AT
7 COMMUNICATION. WHAT WERE THE NATURE OF THE ATTEMPTS AT
8 COMMUNICATING WITH THE DEFENDANTS?

9 **MR. SCHUROWLIEW:** FROM MY UNDERSTANDING, PHONE CALLS,
10 SPEAKING WITH PEOPLE. THAT IS ALL THAT I KNOW OF RIGHT NOW.

11 **THE COURT:** BY YOUR CLIENT.

12 **MR. SCHUROWLIEW:** RIGHT. BY MY CLIENT OR ITS
13 REPRESENTATIVES. OR ITS REPRESENTATIVES. BUT WE WOULD HAVE TO
14 DO FURTHER DISCOVERY ON THAT.

15 **THE COURT:** WELL, ISN'T THAT CALLED "PREFILING
16 INVESTIGATION"?

17 **MR. SCHUROWLIEW:** WELL, YES, IT IS.

18 **THE COURT:** IT'S USUALLY FROM THE OPPOSING PARTY.
19 ISN'T THIS WITHIN YOUR CLIENT'S KNOWLEDGE?

20 **MR. SCHUROWLIEW:** AND WE'VE DONE QUITE A BIT OF
21 PREFILING INVESTIGATION. AND IT SEEMS LIKE WE JUST KEEP DOING
22 MORE AND MORE AND MORE INVESTIGATION. AS THE CASE DEVELOPS WE
23 SIMPLY DO MORE AND MORE INVESTIGATION. WE'VE TRIED TO DO AS MUCH
24 INVESTIGATION AS WE COULD. AND THERE SEEMS TO BE MORE AND MORE
25 INVESTIGATION FORTHCOMING.

1 **THE COURT:** WELL, OBVIOUSLY THE KNOWLEDGE OF THE
2 DEFENDANTS IS CRITICAL, AND THERE'S A DEARTH OF FACTS THAT
3 ESTABLISH IT. YOU HAVE THE CONCLUSION, BUT YOU DON'T HAVE ANY
4 REAL -- ANY SPECIFIC FACTS THAT WOULD ESTABLISH KNOWLEDGE ON
5 THEIR PART. AND YOUR VIEW IS JUST ALLEGING THAT THEY KNEW IS
6 SUFFICIENT?

7 **MR. SCHUROWLIEW:** UNDER IQBAL, PROBABLY NOT.

8 **THE COURT:** OKAY.

9 **MR. SCHUROWLIEW:** NOW --

10 **THE COURT:** AND YOU ALSO ALLEGE THAT THEY USED THE
11 MARK. IT'S NOT CLEAR TO ME IN WHAT WAY THEY USED THE MARK.

12 **MR. SCHUROWLIEW:** THEY USED THE MARK IN THEIR COMPUTER
13 GAMES. THEY USE THE MARK IN THE -- DEFENDANTS' GOGGLE AND AMAZON
14 PUT COMPUTER GAMES INTO THEIR WEBSITE THAT WERE CALLED "FREE KICK
15 MASTER." AND THAT IS IN THE COMPLAINT. THAT IS IN THE
16 SECOND-AMENDED TO COMPLAINT. THERE WERE EVEN PHOTOGRAPHS PUT
17 INTO THE SECOND-AMENDED COMPLAINT AS IN THE EXHIBITS THAT SHOWED
18 WHAT WAS GOING ON.

19 **THE COURT:** ARE YOU TAKING THE POSITION THAT THEY WERE
20 THE PROVIDERS OF THE CONTENT?

21 **MR. SCHUROWLIEW:** WE ARE TAKING THE POSITION THAT THEY
22 WERE -- THAT THESE APPLICATIONS WERE POSTED ON THEIR WEBSITES.
23 THEY PROFITED FROM THESE APPLICATIONS. THEY COLLECTED A CERTAIN
24 AMOUNT OF MONEY FROM THE SALE OF THESE APPLICATIONS.

25 **THE COURT:** BUT THEY WEREN'T THE AUTHOR. ARE YOU

1 ALLEGING THEY WERE THE AUTHOR OF THE APPLICATION?

2 **MR. SCHUROWLIEW:** I'M NOT ALLEGING THAT THEY WERE THE
3 ORIGINAL AUTHOR, BUT THEY HAD CERTAINLY SOMETHING TO DO WITH THE
4 APPLICATION GOING ON THE WEBSITE. THOSE APPLICATIONS HAD TO GO
5 THROUGH A VETTING PROCESS, AS WE LATER DISCOVERED.

6 **THE COURT:** OKAY. OKAY.

7 **MR. SCHUROWLIEW:** SO IT'S NOT LIKE PEOPLE JUST COME IN
8 AND PUT THIS STUFF UP, AND IT JUST SITS THERE. THEY ACTUALLY
9 HAVE TO GO THROUGH SOME SORT OF PROCESS. WHETHER IT'S TO CHECK
10 TO SEE THAT IT'S NOT DEFAMATORY, TO CHECK TO SEE IF IT'S NOT
11 PORNOGRAPHIC, TO CHECK TO SEE IF THERE'S NO ILLUSTRATIONS OF DRUG
12 USE ON THERE, TO CHECK TO SEE IF THERE'S NOTHING HORRIBLY
13 OBJECTIONABLE. IN CERTAIN CASES TO CHECK TO SEE IF THERE'S
14 NOTHING POLITICALLY INCORRECT IN THERE, TO SEE IF IT DOESN'T
15 OFFEND ANYBODY'S SENSIBILITY, TO SEE IF IT DOESN'T CONTAIN
16 NEEDLESS VIOLENCE. I MEAN, ALL OF THESE THINGS ARE CHECKED.
17 OTHERWISE, EVERYBODY WOULD BE PUTTING EVERYTHING UP ON THERE.

18 **THE COURT:** AND THAT PROCESS, DOES THAT AMOUNT TO USE
19 AND KNOWLEDGE, OR JUST ONE OF THE TWO?

20 **MR. SCHUROWLIEW:** I THINK IT WOULD AMOUNT TO KNOWLEDGE.

21 **THE COURT:** AND USE?

22 **MR. SCHUROWLIEW:** BECAUSE IN ORDER FOR THEM TO -- IN
23 ORDER FOR THEM -- ONCE THEY HAVE DONE THAT, ONCE THEY HAVE GONE
24 THROUGH THAT, THEY KNOW WHAT THOSE APPLICATIONS CONTAIN.
25 OTHERWISE, THEY WOULDN'T PUT THEM UP. IF THEY GO THROUGH THIS

1 VETTING PROCESS AND THIS FILTERING PROCESS SOMEBODY THERE HAS TO
2 KNOW ABOUT IT BECAUSE THEY ARE LOOKING AT IT.

3 **THE COURT:** BUT WOULD THEY NECESSARILY KNOW BY GOING
4 THROUGH THIS PROCESS THAT THE MARKS ARE INFRINGING?

5 **MR. SCHUROWLIEW:** IF THEY SAW THE VIDEO, WHICH THEY DO,
6 IT SEEMS TO ME THAT THEY DO WATCH THE VIDEOS OR THEY WATCH THE --
7 PLAY THE APPS THEY CAN LOOK AT IT AND THEY CAN SEE THE NAME.
8 THEY CAN SEE SOMEBODY PLAYING A SOCCER GAME. AND WHEN THEY SEE
9 THE LOGO ALL THEY HAVE DO IS GO TO THE TRADEMARK WEBSITE OR THE
10 COPYRIGHT WEBSITE, TYPE IN THREE WORDS AND IT POPS UP.

11 I DON'T THINK THAT'S ASKING TOO MUCH, YOUR HONOR. IT ONLY
12 TAKES LIKE 25 SECONDS. IF THEY CAN DO ALL OF THESE OTHER THINGS
13 THEN THEY CERTAINLY CAN DO THAT.

14 **THE COURT:** OKAY.

15 **MR. SCHUROWLIEW:** I DON'T THINK IT'S EXTREMELY
16 BURDENSOME TO DO ALL THAT. THEY SAY THAT THEY ARE NOT THE
17 PUBLISHER OF ONE-AND-A-HALF MILLION APPS. WELL, THEY CERTAINLY
18 CHECK THEM.

19 NOW, GRANTED YOU ARE ABSOLUTELY CORRECT THAT WE DID NOT
20 PROVIDE ALL THOSE -- ALL THAT PAPERWORK ON THEIR PRODUCT
21 DEVELOPMENT FROM THEIR PRODUCT DEVELOPMENT WEBSITE. WE PROVIDED
22 THAT LATER ON IN OUR BRIEFS OPPOSED TO THEM.

23 BUT THE POINT IS IT DOES EXIST. THEY ACTUALLY DO SOMETHING
24 BESIDES ALLOW PEOPLE SIMPLY TO POST THINGS RANDOMLY, AT WILL,
25 WITHOUT HAVING ANY KNOWLEDGE OF ANYTHING.

1 AND I THINK IF THEY ARE TRYING TO ASSERT THAT, THEN IT'S
2 ABSOLUTELY WRONG AND IT'S NOT TRUE. THEY HAVE TO KNOW WHAT IS
3 BEING POSTED ON THERE, WHAT IS BEING PUT INTO THEIR APP STORE AND
4 WHAT IS BEING PUT ON THEIR WEBSITE.

5 IT WOULD BE RIDICULOUS TO THINK THAT THEY DIDN'T. AND THEY
6 HAVE THESE DEVELOPMENT WEBSITES WHERE THEY TELL PEOPLE WHAT TO
7 DO.

8 **THE COURT:** BUT CLEARLY KNOWING THAT AN APP IS BEING
9 POSTED AND AVAILABLE FOR DOWNLOAD DOESN'T NECESSARILY MEAN THAT
10 ONE HAS KNOWLEDGE THAT IT'S INFRINGING.

11 **MR. SCHUROWLIEW:** I SUPPOSE THEY COULD BE BLIND TO IT.
12 I SUPPOSE THEY COULD JUST DELIBERATELY AVOID DOING IT ALTOGETHER.
13 THEY COULD JUST COLLECT THE MONEY. IF THAT'S WHAT THEY WANT TO
14 DO, FINE. THEY CAN COLLECT THEIR 30 PERCENT. THEY CAN GO HOME
15 AND SAY:

16 "WE DON'T KNOW ANYTHING ABOUT ANYTHING. WE DON'T WANT
17 TO KNOW ANYTHING ABOUT ANYTHING? POST WHATEVER YOU WANT.
18 WE'RE COLLECTING OUR 30 PERCENT. YOU TAKE THE CONSEQUENCES.
19 WE'RE GOING TO KEEP OUR MONEY, AND WE'RE GOING TO GO ON AND
20 WE'RE GOING TO POST EVERYTHING. AND WE JUST COLLECT OUR
21 MONEY, AND WE'RE HAPPY. AND EVERYBODY ELSE GETS ALL THE
22 PROBLEMS WITH THE LAWSUITS AND EVERYTHING ELSE."

23 THAT CERTAINLY PROVIDES A GOOD WAY FOR THEM TO HAVE AN OUT
24 TO MAKE ALL KINDS OF MONEY OFF OF EVERYBODY ELSE AND NOT SUFFER
25 ANY CONSEQUENCES WHATSOEVER. THAT'S FINE. IF THAT'S THE WAY

1 IT'S GOING TO BE, THEN THAT'S FINE.

2 BUT I'M JUST BRINGING THIS UP THAT WE FEEL THAT THEY HAVE
3 COLLECTED ALL KINDS OF MONEY. NOT JUST FROM FREE KICK MASTER. I
4 MEAN, THEY HAVE GIVEN THE FREE KICK MASTER APPS AWAY. THEY
5 ADVERTISE "WE'RE GIVING THEM AWAY."

6 WHETHER APPLE DID THAT OR GOGGLE DID THAT OR SAMSUNG DID
7 THAT, WHOEVER DID THAT. THEY ARE GIVING THESE THINGS AWAY.
8 OKAY. THEY ARE NOT COLLECTING MONEY. BUT WHEN THEY DO THEY
9 COLLECT MONEY. ON SOME OF THESE PRODUCT DEVELOPMENT PORTALS THEY
10 TALK ABOUT A 70/30 SPLIT.

11 THESE PEOPLE ARE GETTING MONEY FROM WHATEVER THEY ARE DOING.
12 AND IF THEY ARE ALLOWED TO GET AWAY WITH THIS BECAUSE OF THEIR
13 RELIANCE ON THE CDA, OR ANYTHING ELSE LIKE THAT, YOU KNOW THEY
14 GET AWAY WITH IT, BUT THEN WE HAVE TO TURN AROUND. WE HAVE TO GO
15 SUE ALL OF THESE PEOPLE IN CHINA, OR WHEREVER IT IS, THAT ARE
16 JUST PRODUCING THESE THINGS AND POSTING IT ON GOGGLE AND AMAZON.
17 THAT'S BASICALLY WHAT IT COMES DOWN TO.

18 AND GOGGLE AND AMAZON GET AWAY WITH THEIR 30 PERCENT, AND
19 THEY DON'T HAVE TO SUFFER ANY CONSEQUENCES. ALL THEY HAVE TO DO
20 IS HIDE BEHIND THESE STATUTES. WHICH WE FEEL, BY THE WAY, LIKE
21 THE DECENCY ACT WAS NOT MEANT TO BE A STATUTE THAT ALLOWS PEOPLE
22 WHO MAKE MONEY ON THIS STUFF TO HIDE BEHIND IT TO PROTECT THEIR
23 INCOME STREAM.

24 THAT WAS SUPPOSED TO -- THAT WAS ORIGINALLY CREATED -- I'M
25 SURE YOUR HONOR KNOWS A LOT MORE ABOUT THIS THAN I DO.

1 **THE COURT:** THERE'S NO PROVISION IN THE ACT THAT
2 EXEMPTS THE INTERACTIVE COMPUTER SERVICES WHO ARE MAKING MONEY.

3 **MR. SCHUROWLIEW:** NO, BUT THEY HAVE THE EXEMPTION FOR
4 INTELLECTUAL PROPERTY RIGHTS. THAT'S IN 230E2. THERE IS AN
5 EXEMPTION: ANYTHING HAVING TO DO WITH INTELLECTUAL PROPERTY
6 RIGHTS IS EXEMPT FROM THE PURVIEW OF THE STATUTE.

7 **THE COURT:** OKAY.

8 **MR. SCHUROWLIEW:** OKAY? AND THEN, WHAT WE'RE SAYING IS
9 THAT -- NOW, THEY HAVE ALSO SAID THAT OUR ARGUMENT ABOUT
10 PREEMPTION IS NOT CORRECT. THAT THIS HAS NOTHING TO DO WITH
11 PREEMPTION.

12 BUT IN THEIR OWN -- IN THEIR OWN BRIEF, THEY CITE A CASE.
13 AND I'D LIKE TO READ IT TO YOU, IF YOU DON'T MIND. IN THEIR OWN
14 MOTION -- I'M SORRY -- IN THEIR OWN MOTION. THIS IS ON PAGE TEN
15 OF 13 OF GOGGLE'S AND AMAZON'S JOINT MOTION. AND THEY TALK ABOUT
16 PERFECT TEN, INC. V. CC BILL LLC.

17 "THE COMMUNICATIONS DECENCY ACT STATES THAT NO
18 PROVIDER, USER OF AN INTERACTIVE SERVICE SHALL BE TREATED
19 AS THE PUBLISHER OR SPEAKER OF ANY INFORMATION PROVIDED BY
20 ANOTHER INFORMATION CONTENT PROVIDER AND EXPRESSLY" --

21 **THE COURT:** EXCUSE ME. EXCUSE ME. WHEN YOU'RE READING
22 YOU'RE READING A MILE A MINUTE.

23 **MR. SCHUROWLIEW:** OKAY.

24 **THE COURT:** OUR COURT REPORTER IS FABULOUS, BUT SHE
25 CAN'T TYPE A MILE A MINUTE. PLEASE BE MINDFUL OF THAT AND SLOW

1 DOWN IF YOU ARE GOING TO READ.

2 **MR. SCHUROWLIEW:** OKAY, THANK YOU.

3 "AND EXPRESSLY PREEMPTS ANY STATE LAW TO THE CONTRARY."

4 OKAY. SO THIS IS -- THEY SAY IT'S NOT A PREEMPTION
5 ARGUMENT, BUT IT IS A PREEMPTION ARGUMENT. THEY USE THE WORD
6 "PREEMPT."

7 SO WHAT I'M BASICALLY SAYING IS IF THE STATE LAW IS THE SAME
8 AS THE FEDERAL LAW OR HAS PROVISIONS THAT ARE CONGRUENT TO THE
9 FEDERAL LAW, THEN THE STATE CLAIMS SHOULD NOT BE THROWN OUT.

10 **THE COURT:** OKAY.

11 **MR. SCHUROWLIEW:** THERE'S ANOTHER CASE THAT TALKS ABOUT
12 CONGRUENCY AND TWO TRIANGLES FROM MATHEMATICS ARE CONGRUENT IF
13 THEY HAVE THE SAME SIDES, OR THE SAME SIDES AND ANGLES, WHICH IS
14 THE SAME THING.

15 SO, IF TWO THINGS ARE CONGRUENT, THEN THEY SHOULD STATE TO
16 THAT EXTENT.

17 **THE COURT:** OKAY.

18 **MR. SCHUROWLIEW:** AND I CITED A COUPLE OF CASES OR OUR
19 SIDE CITED A COUPLE OF CASES TALKING ABOUT PREEMPTION, WHICH IS
20 WHAT THEY HAD IN THEIR BRIEF, WHICH I JUST READ. AND WE TALKED
21 ABOUT THE STATE CAUSES OF ACTION CAN STAY AS LONG AS THEY ARE
22 CONGRUENT TO THE FEDERAL CAUSE OF ACTION, WHICH IS THE LANHAM
23 ACT.

24 **THE COURT:** ALL RIGHT.

25 **MR. SCHUROWLIEW:** OKAY.

1 **THE COURT:** IS THAT IT?

2 **MR. SCHUROWLIEW:** THANK YOU VERY MUCH, YOUR HONOR.

3 **THE COURT:** ALL RIGHT.

4 **MR. SCHUROWLIEW:** APPRECIATE IT.

5 **THE COURT:** DO YOU WISH TO RESPOND?

6 **MR. PAGE:** VERY BRIEFLY, YOUR HONOR. I THINK THE COURT
7 CAN LOOK AT THE FOUR PARAGRAPHS HE CITED AND NONE OF THEM SAY
8 ANY -- STATE ANY FACTS THAT WOULD INDICATE KNOWLEDGE.

9 VERY BRIEFLY, THE IDEA THAT IF ANY OF THESE ISPS -- APPLE
10 HAS A MILLION AND A HALF APPS ON THEIR WEBSITE. GOGGLE HAS
11 HUNDREDS OF THOUSANDS OF APPS. AMAZON HAS HUNDREDS OF THOUSANDS.

12 EVEN IF IN THE THEORETICAL WORLD MY OPPONENT PROPOSES, WE
13 HAD AN OBLIGATION TO GO FIGURE OUT WHETHER ANY HAVE THEM INFRINGE
14 TRADEMARK RIGHTS OR WERE LICENSED OR WERE IN ANY WAY INFRINGING,
15 AND EVEN IF WE WENT TO THE TRADEMARK OFFICE WEBSITE AND LOOKED UP
16 THEIR MARK, WHAT WE WOULD FIND IS THAT THEY HAVE A MARK THAT IS
17 REGISTERED IN THE FIELD OF USE FOR PUTTING ON SPORTING EVENTS IN
18 STADIUMS, PERIOD.

19 THEY DON'T HAVE A TRADEMARK THAT COVERS THIS USE. THEY HAVE
20 A SISTER COMPANY THAT'S APPLIED FOR ONE, ALTHOUGH THEY HAVE NEVER
21 MADE AN APP. AND THEY ARE NOT A PLAINTIFF IN THIS CASE.

22 SO EVEN IF WE HAD THE OBLIGATION, WHICH WE DON'T, TO GO
23 LOOK, THE ANSWER WOULD HAVE BEEN THEY DON'T HAVE A TRADEMARK IN
24 THIS FIELD OF USE.

25 SO, IT JUST SIMPLY WOULDN'T WORK.

1 ON THE CDA ISSUE, THERE ARE TWO DIFFERENT PIECES OF THE CDA.
2 THEY ARE TALKING ABOUT GOOD SAMARITAN PROVISIONS WHICH SAY
3 THAT IF WE POLICE OUR OWN WEBSITE AND TAKE DOWN THINGS WE FIND
4 OFFENSIVE WE CAN'T BE HELD LIABLE FOR HAVING DONE SO. THE OTHER
5 HALF OF THE CDA SAYS THAT WE'RE NOT LIABLE FOR MATERIAL AUTHORED
6 BY THIRD PARTIES.

7 CC BILL IS A COMMUNICATIONS DECENCY ACT PREEMPTION CASE.
8 THERE'S LOTS OF KINDS OF PREEMPTION. THERE'S ALSO LANHAM ACT
9 PREEMPTION. WE HAVEN'T ARGUED LANHAM ACT PRESUMPTION. SO THE
10 FACT THAT THERE ARE EXCEPTIONS TO LANHAM ACT PREEMPTION IS
11 TOTALLY IRRELEVANT HERE.

12 WITH THAT, UNLESS THE COURT HAS ANY QUESTIONS, WE'D BE HAPPY
13 TO SUBMIT.

14 **THE COURT:** WELL, IT SEEMS TO ME THAT THE REAL PROBLEM
15 HERE IS THE KNOWLEDGE COMPONENT, WHICH IS NOT IN MY VIEW
16 ADEQUATELY PLED. AND AS I INDICATED I'M NOT EVEN LOOKING AT THE
17 DOCUMENTS THAT WERE STAPLED TO THE OPPOSITION BRIEF.

18 WHAT'S YOUR POSITION ON WHETHER OR NOT, ASSUMING I DISMISS
19 ON THE GROUNDS THAT THERE ARE INSUFFICIENT ALLEGATIONS AS TO
20 KNOWLEDGE ON THE PART OF THE DEFENDANTS, WHAT'S YOUR POSITION ON
21 LEAVE TO AMEND?

22 **MR. PAGE:** WE'RE AGAINST IT, SURPRISINGLY ENOUGH. THIS
23 IS THE THIRD AMENDED COMPLAINT. IT'S THE FIRST ONE IN THIS
24 COURT, BUT WE'VE AROUND TWICE IN CLEVELAND BEFORE THIS. THEY
25 HAVE HAD THREE SHOTS AT PLEADING THIS.

1 **THE COURT:** WERE THERE ACTUAL MOTIONS FILED?

2 **MR. PAGE:** YES.

3 **THE COURT:** THEY WEREN'T STIPULATED AMENDMENTS
4 PREVIOUSLY?

5 **MR. PAGE:** I'M NOT SURE ABOUT THE FIRST ONE. THE
6 SECOND ONE THERE WAS A MOTION TO TRANSFER OR DISMISS. ALL OF
7 THESE ARGUMENTS WERE MADE. THEY THEN FILE -- THE COURT
8 TRANSFERRED RATHER THAN REACH THE RULE 12 ISSUES.

9 **THE COURT:** SO IT'S ONLY BEING BROUGHT BEFORE THE COURT
10 FOR THE FIRST TIME HERE.

11 **MR. PAGE:** RIGHT. BUT ALL OF THE -- BUT THE COMPLAINT
12 HAS BEEN AMENDED AGAIN IN LIGHT OF ALL OF THESE ARGUMENTS WHICH
13 WERE BRIEFED IN OHIO. THESE ARE NOT NEW ISSUES TO THEM. IF THEY
14 HAD ANSWERS TO THEM THEY COULD HAVE AMENDED LAST TIME.

15 THE IDEA THAT IF THEY COULD JUST TAKE DISCOVERY THEY COULD
16 FIGURE OUT WHETHER THEY SENT US A NOTICE IS FRANKLY ABSURD. YOU
17 KNOW, ALL THE DISCOVERY IN THE WORLD ISN'T GOING TO TELL THEM
18 WHAT THEY DID. THEY HAVE KNOWN IT'S AN ISSUE. THEY HAVE HAD NOW
19 THREE COMPLAINTS.

20 WE WOULD URGE THE COURT TO DISMISS WITH PREJUDICE.

21 **THE COURT:** OKAY. ALL RIGHT, COUNSEL. I WOULD LIKE
22 YOU TO SPEAK TO THAT. WHAT IF I WERE TO GIVE YOU LEAVE TO AMEND
23 ON THE KNOWLEDGE ISSUE, WHAT WOULD YOU ADD? SINCE YOU'RE NOT
24 GOING TO BE ABLE TO GET ANY DISCOVERY UNTIL AFTER YOU PASS THIS
25 STAGE.

1 **MR. SCHUROWLIEW:** WELL, WE WOULD HAVE TO -- WE WOULD
2 HAVE TO SPEAK TO EVERYBODY ASSOCIATED WITH THE PLAINTIFF IN ORDER
3 TO OBTAIN SPECIFIC FACTS DEALING WITH PHONE CALLS, TEXT MESSAGES,
4 ANYTHING THAT THEY -- ANY KIND OF COMMUNICATIONS THAT THEY HAD
5 WITH GOOGLE AND AMAZON.

6 **THE COURT:** AND YOU DIDN'T DO THAT BEFORE YOU FILED THE
7 SECOND-AMENDED COMPLAINT?

8 **MR. SCHUROWLIEW:** WE FRANKLY -- WE WERE NOT -- WE DID
9 NOT THINK THAT ACTUAL KNOWLEDGE WAS REQUIRED. WE THOUGHT THAT
10 CONSTRUCTIVE KNOWLEDGE WAS SUFFICIENT. AND WE FELT THAT WE HAD
11 ENOUGH AS FAR AS CONSTRUCTIVE KNOWLEDGE GOES BECAUSE WE WERE ABLE
12 TO SEE THAT THESE PEOPLE HAD NOTICE FROM THE TRADEMARK OFFICE AND
13 WE WERE ABLE TO SEE THAT THEY HAD ALL OF THESE VETTING PROCEDURES
14 FOR CHECKING THE APPS.

15 SO IF THEY ARE GOING TO BE CHECKING ALL OF THESE THINGS WE
16 FELT THAT THEY HAD, IN TERMS OF CHECKING FOR, LIKE I DISCUSSED,
17 PORNOGRAPHY, DRUG USE, ANIMAL RIGHTS, VIOLENCE, YOU KNOW, THIS,
18 THAT AND THE OTHER THING. AND IT EVEN STATES IN SOME OF THEIR
19 PROGRAM DEVELOPMENT PORTALS THAT THEY DO CHECK ON --

20 **THE COURT:** YOU'RE REHASHING. THE ANSWER IS NO.

21 **MR. SCHUROWLIEW:** RIGHT.

22 **THE COURT:** YOU DIDN'T DO ANY CHECKING OF THE --
23 WHETHER OR NOT THERE ARE TEXT MESSAGES, NOTICE, ET CETERA.

24 **MR. SCHUROWLIEW:** NO. WE FELT THAT CONSTRUCTIVE
25 KNOWLEDGE WAS SUFFICIENT; THAT THEY HAD TO ESTABLISH --

1 **THE COURT:** ALL RIGHT. THANK YOU.

2 **MR. SCHUROWLIEW:** THANK YOU.

3 **THE COURT:** SAMSUNG'S COUNSEL?

4 **MR. ULIN:** THANK YOU, YOUR HONOR. AND I'LL TRY AS
5 BEST I CAN NOT TO REFLOW SOME OF THE GROUND THAT HAS BEEN
6 COVERED.

7 THERE ARE TWO QUESTIONS ESSENTIALLY PRESENTED BY SAMSUNG'S
8 MOTION. NUMBER ONE: SHOULD THE SECOND AMENDED COMPLAINT AGAINST
9 SAMSUNG BE DISMISSED? AND THEN, NUMBER TWO, IF IT IS DISMISSED
10 SHOULD THE PLAINTIFF BE GIVEN LEAVE TO AMEND TO MAKE A FOURTH
11 ATTEMPT AT COMPLETING AN ACTIONABLE COMPLAINT AGAINST SAMSUNG?

12 FIRST WITH RESPECT TO DISMISSAL OF THE SECOND-AMENDED
13 COMPLAINT, ALL THREE OF THE PRIOR COMPLAINTS HAVE SOUNDED IN
14 DIRECT LIABILITY. YOUR HONOR NOTED THAT THE WORD "CONTRIBUTORY
15 LIABILITY" OR "CONTRIBUTORY INFRINGEMENT" APPEAR NOWHERE IN THE
16 SECOND-AMENDED COMPLAINT. AND THEY ARE NOT IN ANY OF THE PRIOR
17 COMPLAINTS, EITHER.

18 THERE ARE FIVE CLAIMS IN THOSE COMPLAINTS, OR PARTICULARLY
19 IN THE SECOND-AMENDED COMPLAINT. TRADEMARK INFRINGEMENT UNDER
20 THE LANHAM ACT. FALSE DESIGNATION OF ORIGIN UNDER THE LANHAM
21 ACT. STATE LAW TRADEMARK INFRINGEMENT. AND THEN, CLAIMS FOR
22 VIOLATIONS OF CALIFORNIA BUSINESS AND PROFESSIONS CODE, SECTION
23 17200 AND 17500.

24 WITH RESPECT TO THE SECOND-AMENDED COMPLAINT AND ITS DIRECT
25 LIABILITY CLAIMS AGAINST SAMSUNG, ALL OF THOSE CLAIMS REQUIRE

1 SOME ALLEGATION THAT SAMSUNG ACTUALLY USED PLAINTIFF'S
2 TRADEMARKS, WHICH IS COMPLETELY ABSENT FROM THE SECOND-AMENDED
3 COMPLAINT.

4 THAT WOULD BE EITHER USE IN COMMERCE TO SUPPORT THE
5 TRADEMARK AND FALSE DESIGNATION CLAIMS, AS WELL AS UCL CLAIM OR
6 USE IN ADVERTISING TO SUPPORT THE FALSE ADVERTISING LAW COMPLAINT
7 OR CLAIM.

8 UNLIKE THE OTHER DEFENDANTS IN THIS CASE, THE ALLEGATIONS
9 AGAINST SAMSUNG DO NOT CLAIM THAT WE RAN AN APP STORE THROUGH
10 WHICH FOLKS COULD DOWNLOAD INFRINGING APPS. THE ALLEGATIONS
11 AGAINST SAMSUNG AT PARAGRAPHS 21 AND 22 OF THE SECOND-AMENDED
12 COMPLAINT ALLEGE ONLY THAT SAMSUNG SELLS MOBILE DEVICES THAT SOME
13 PURCHASERS MAY USE TO DOWNLOAD INFRINGING APPS FROM THIRD-PARTY
14 WEBSITES.

15 AND THEN THE COMPLAINT ATTACHES AN EXAMPLE OF A
16 THIRD-PARTY -- OR WHAT PURPORTS TO BE A PRINTOUT FROM A
17 THIRD-PARTY WEBSITE THAT IT IS USED TO ILLUSTRATE WHAT PLAINTIFF
18 BELIEVES GIVES RISE TO LIABILITY FOR SAMSUNG.

19 EFFECTIVELY, BECAUSE THE PLAINTIFF FAILS TO ALLEGE THAT
20 SAMSUNG ACTUALLY USED ITS TRADEMARKS, ALL OF THE CLAIMS AGAINST
21 SAMSUNG AS THEY ARE PLED IN THE SECOND-AMENDED COMPLAINT FAIL.
22 AND THE PLAINTIFF HAS BASICALLY CONCEDED THE KEY POINTS THAT
23 MAKE OUT THAT ARGUMENT THIS MORNING.

24 PLAINTIFF HAS CONCEDED THAT SAMSUNG DIDN'T CREATE THOSE APPS
25 AND THAT THE WEBSITES THAT IT HAS -- THAT IT BELIEVES, YOU KNOW,

1 SELL THOSE APPS ARE THIRD-PARTY SITES NOT RUN BY SAMSUNG.

2 WE'RE NOT USING THE TRADEMARK BY EITHER OF THE METHODS THAT
3 PLAINTIFF COMPLAINS ABOUT ITS USE IN THIS CASE, AND THEREFORE ALL
4 FIVE OF THOSE CLAIMS FAIL.

5 I LEFT OUT, OF COURSE, INJUNCTIVE RELIEF WHICH PLAINTIFF
6 CONCEDES IS NOT A CLAIM BUT ONLY A REMEDY. OF COURSE, IT'S
7 LONG-STANDING LAW DATING ALL THE WAY BACK TO THE SONY BETA MAX
8 CASE THAT SIMPLY SELLING DEVICES THAT OTHER PEOPLE MAY USE TO
9 INFRINGE OR DOWNLOAD INFRINGING MATERIAL IS NOT SUFFICIENT TO
10 ESTABLISH CONTRIBUTORY LIABILITY. AND THAT'S IN THE COPYRIGHT
11 SPHERE.

12 IN THE TRADEMARK SPHERE WHERE CONTRIBUTORY LIABILITY IS EVEN
13 MORE CONSTRAINED IT'S CERTAINLY NOT SUFFICIENT. IN RESPONSE TO
14 ALL OF THIS, PLAINTIFF SORT OF PRESAGED WHAT THEY WOULD DO TODAY
15 BY ESSENTIALLY ACKNOWLEDGING THAT THEY CAN'T PLEAD DIRECT
16 INFRINGEMENT AGAINST SAMSUNG AND ABANDONING THE CLAIMS IN THEIR
17 SECOND-AMENDED COMPLAINTS, ALL OF WHICH SUGGEST THAT THE PROPER
18 ANSWER TO THE FIRST QUESTION IS THAT COMPLAINT NEEDS TO BE
19 DISMISSED.

20 AND THEN THE QUESTION IS: DO THEY GET TO TRY AGAIN FOR A
21 FOURTH TIME?

22 BY THE WAY, IT IS ALSO CONSISTENT -- THE NOTION THAT THEY
23 CAN'T PLEAD DIRECT INFRINGEMENT IS CONSISTENT WITH THAT EXHIBIT
24 EIGHT TO THEIR COMPLAINT WHICH IS -- PURPORTS TO BE A PRINTOUT
25 FROM A THIRD-PARTY WEBSITE. THAT'S ALL THE EVIDENCE THAT

1 SUPPORTS THE CLAIM.

2 THAT'S THE SAME EVIDENCE IN RESPONSE TO YOUR HONOR'S
3 EARLIER QUESTION ABOUT WHETHER THERE HAD BEEN PRIOR MOTIONS TO
4 DISMISS. THAT'S THE SAME EVIDENCE THAT THEY SHOWED TO JUDGE
5 NEUGENT IN OHIO TO SUGGEST THAT THEY OUGHT TO BE ALLOWED TO AMEND
6 THEIR COMPLAINT TO COMPLY WITH EVIDENCE THAT WOULD SUPPORT A
7 CLAIM AGAINST SAMSUNG.

8 THERE WAS EXHIBIT TWO TO THEIR OPPOSITION TO THE MOTION TO
9 DISMISS THE FIRST-AMENDED COMPLAINT. THEY NOW CLAIM WITH RESPECT
10 TO SAMSUNG FOR THE FIRST TIME THAT THIS IS A CASE ABOUT
11 CONTRIBUTORY INFRINGEMENT. AGAIN, NOT MENTIONED IN THE
12 SECOND-AMENDED COMPLAINT.

13 SO THIS WOULD BE PRESUMABLY A BASIS FOR REQUEST FOR LEAVE TO
14 AMEND AND TO FILE A THIRD-AMENDED COMPLAINT. BUT THE ALLEGATIONS
15 OF THE SECOND-AMENDED COMPLAINT CERTAINLY DON'T SUPPORT THAT
16 ARGUMENT. THE ALLEGATIONS IN THAT DOCUMENT LACK ESSENTIAL --
17 LACK THE ESSENTIAL ELEMENTS OF, NUMBER ONE, THAT SAMSUNG HAD
18 KNOWLEDGE OF SPECIFIC INSTANCES OF INFRINGEMENT BY IDENTIFIED
19 INDIVIDUAL INFRINGERS.

20 AND NUMBER TWO, THAT SAMSUNG IN THIS INSTANCE BECAUSE THAT
21 INFRINGEMENT OCCURRED OVER INTERNET WEBSITES HAD DIRECT
22 MONITORING OR DIRECTLY MONITORED AND HAD DIRECT CONTROL OVER
23 THOSE THIRD-PARTY WEBSITES SUCH THAT IT COULD DO SOMETHING ABOUT
24 THE INFRINGEMENT.

25 THOSE ELEMENTS ARE ESTABLISHED IN THE NINTH CIRCUIT'S

1 PERFECT TEN VERSUS VISA CASE, AS WELL AS THE SECOND CIRCUIT'S
2 TIFFANY VERSUS EBAY CASE, BOTH OF WHICH ARE CITED IN OUR PAPERS.

3 ABSENT THOSE ELEMENTS THE SECOND-AMENDED COMPLAINT WON'T
4 SUPPORT CONTRIBUTORY LIABILITY AGAINST SAMSUNG AND, THEREFORE,
5 THE NOTION THAT THIS -- THAT PLAINTIFF CLAIMS THIS IS A
6 CONTRIBUTORY LIABILITY CASE IS NOT SUFFICIENT TO SAVE THE
7 SECOND-AMENDED COMPLAINT.

8 SIMILARLY WITH RESPECT TO THE SECOND-AMENDED COMPLAINT AND
9 THE LAST POINT I'LL MAKE WITH RESPECT TO DISMISSAL OF THAT
10 DOCUMENT IS AS TO THE FALSE ADVERTISING LAW AND THE UNFAIR
11 COMPETITION LAW, THE PRECEDENCE FROM DISTRICT COURTS WITHIN THE
12 NINTH CIRCUIT IS THAT THOSE CLAIMS BECAUSE THEY SOUND IN
13 MISREPRESENTATION MUST MEET THE HEIGHTENED PLEADING STANDARD OF
14 RULE 9 (B).

15 SO THERE HAS TO BE ALLEGATIONS OF THE WHO, WHAT, WHEN, WHERE
16 AND HOW, SPECIFIC ALLEGATIONS OF THE TIME, PLACE AND CONTENT OF
17 THE REPRESENTATIONS THAT GIVE RISE TO LIABILITY, NONE OF WHICH IS
18 IN THE SECOND-AMENDED COMPLAINT.

19 AND I DO WANT TO -- IF I MAY, YOUR HONOR, I WANT TO CITE TWO
20 CASES BECAUSE I DIDN'T ARGUE THAT PRINCIPLE IN OUR BRIEF. THE
21 TWO CASES WOULD BE WITH RESPECT TO THE FALSE ADVERTISING LAW
22 EPICOR, E-P-I-C-O-R, SOFTWARE CORPORATION VERSUS ALTERNATE TECH
23 SOLUTIONS 2013 WESTLAW, 2382262 AT STAR FOUR.

24 AND THEN, WITH RESPECT TO THE UNFAIR COMPETITION LAWS,
25 HERRON, H-E-R-R-O-N, VERSUS BEST BUY COMPANY, 924 F.SUPP2D 1161

1 AT 1170.

2 THAT THEN BRINGS US TO THE QUESTION OF DISMISSAL WITH
3 PREJUDICE, THE QUESTION YOU ASKED COUNSEL:

4 "SO IF I DISMISS THE SECOND-AMENDED COMPLAINT SHOULD
5 THEY BE GIVEN AN OPPORTUNITY TO PLEAD A THIRD-AMENDED
6 COMPLAINT AGAINST SAMSUNG?"

7 AND THE ANSWER TO THAT QUESTION IS PRETTY CLEARLY NO. AND
8 SOME OF THE ANSWERS THAT PLAINTIFF HAS GIVEN YOU THIS MORNING I
9 THINK SUBSTANTIATE THAT, THAT CONCLUSION.

10 THE PLAINTIFF SEEKS TO AMEND BASED ON SOME EXHIBITS THAT
11 YOUR HONOR HAS INDICATED THAT YOU'RE NOT GOING TO TAKE INTO
12 ACCOUNT, THAT ARE ATTACHED TO THE MOTION TO DISMISS. I WOULD
13 NOTE THAT THOSE DOCUMENTS ONLY UNDERScore THE FUTILITY OF AN
14 AMENDMENT TO ADD A SECONDARY LIABILITY CLAIM OR CONTRIBUTORY
15 LIABILITY CLAIM AGAINST SAMSUNG.

16 WHAT DO THEY SHOW? THERE ARE SIX EXHIBITS. THE FIRST THREE
17 PURPORT TO BE MORE PRINTOUTS FROM THIRD-PARTY WEBSITES. WEBSITE
18 CALLED "PLAY.MOB.ORG."

19 ANOTHER ONE CALLED "MOBILESM" -- I'M SORRY. "MOBILESMSPK."
20 AND A THIRD ONE CALLED "MOBILES24.CO," WHICH PLAINTIFF CONCEDES
21 ARE THIRD-PARTY WEBSITES. AND THERE'S NO INDICATION OR NO
22 ALLEGATION OR INDICATION THAT ANY OF THOSE WEBSITES ARE RUN OR IN
23 ANY WAY CONTROLLED BY SAMSUNG.

24 PLAINTIFF ALLEGES IN THE SECOND-AMENDED COMPLAINT AND MAKES
25 NO INDICATION IN ITS OPPOSITION TO THE MOTION TO DISMISS THAT IT

1 HAS ANY ABILITY TO ALLEGE IN A THIRD-AMENDED COMPLAINT THAT
2 SAMSUNG HAD ACTUAL KNOWLEDGE OF SPECIFIC INFRINGEMENT ON THOSE
3 SITES, OF THE SPECIFIC APPS THAT IT HAS IDENTIFIED ON THOSE SITES
4 AS INFRINGING OR THAT SAMSUNG HAD ANY ABILITY TO CONTROL THOSE
5 SITES EVEN IF THERE WERE KNOWLEDGE.

6 WITHOUT THE ABILITY TO MAKE THOSE ALLEGATIONS, THE PLAINTIFF
7 CAN'T ALLEGE A SECONDARY OR A CONTRIBUTORY LIABILITY CLAIM
8 AGAINST SAMSUNG, AND THEREFORE, THE AMENDMENT WOULD BE FUTILE.

9 WE WOULD SIMPLY BE BACK HERE AGAIN ON ANOTHER MOTION TO
10 DISMISS.

11 WITH RESPECT TO EXHIBITS FOUR THROUGH SIX IN THAT COMPLAINT,
12 ALL OF THOSE ARE TERMS AND CONDITIONS FOR THE USE OF VARIOUS
13 SAMSUNG-RELATED WEBSITES, NONE OF WHICH ARE AT ALL RELATED TO THE
14 THIRD-PARTY WEBSITES THAT THE PLAINTIFF HAS PUT FORWARD AS
15 EVIDENCE OF WHAT THEY ARE COMPLAINING ABOUT. SO THERE'S NO
16 INDICATION THAT ANY OF THOSE WEBSITES OR THAT THERE'S ANY
17 INFRINGEMENT RELATED TO THE SAMSUNG DEVELOPER'S WEBSITE WHICH IS
18 EXHIBIT -- WHICH IS THE TERMS FOR WHICH ARE EXHIBIT FOUR. OR
19 THAT THERE'S ANY RELATIONSHIP BETWEEN THESE THIRD-PARTY WEBSITES
20 THAT PLAINTIFF HAS IDENTIFIED AND THE GALAXY APPS SITE WHICH IS
21 REVIEW AND CONDITIONS FOR WHICH ARE IN EXHIBIT FIVE, OR THE
22 SELLER.SAMUNGAPPS.COM SITE, TERMS OF WHICH ARE IN EXHIBIT SIX.

23 SO EVEN IF THOSE TERMS AND CONDITIONS WERE TO ESTABLISH SOME
24 SORT OF PROCESS THAT MIGHT LEAD ONE TO CONCLUDE THAT IF YOU WENT
25 THROUGH THAT PROCESS SAMSUNG MIGHT KNOW OR HAVE REASON TO KNOW

1 THAT THERE WAS INFRINGEMENT ON A SITE, THERE'S NO INDICATION AND
2 NO ALLEGATION THAT ANY OF THE THIRD-PARTY WEBSITES AT ISSUE HERE
3 IS AT ALL RELATED TO THOSE SITES.

4 MOREOVER, IF YOU LOOK AT THE TERMS AND CONDITIONS WHAT THEY
5 ESSENTIALLY SAY IS THAT SAMSUNG HAS RESERVED ITS RIGHT TO REVIEW
6 SUBMISSIONS BY CERTAIN THIRD PARTIES. IT DOESN'T SAY
7 SPECIFICALLY THAT THAT REVIEW WILL ALWAYS TAKE PLACE. IT DOESN'T
8 SAY SPECIFICALLY WHAT THAT REVIEW WILL ALWAYS ENTAIL, NOR DOES IT
9 ESTABLISH THE KEY ELEMENT OF CONTRIBUTORY TRADEMARK LIABILITY,
10 WHICH IS THE ACTUAL KNOWLEDGE OF SPECIFIC INSTANCES OF
11 INFRINGEMENT BY AN IDENTIFIED THIRD PARTY.

12 FINALLY, I WANT TO THE TOUCH BRIEFLY ON ONE POINT SINCE IT'S
13 BEEN RAISED A NUMBER OF TIMES, WHICH IS THIS 2011 LETTER OR
14 PURPORTED LETTER. AGAIN, AS YOUR HONOR NOTED, NOT AUTHENTICATED
15 BUT ATTACHED TO THE SECOND-AMENDED COMPLAINT TO SAMSUNG. FIRST
16 OF ALL, TO SAMSUNG IN KOREA, NOT TO THE DEFENDANT IN THIS CASE,
17 SAMSUNG ELECTRONICS AMERICA.

18 BUT LEAVING THAT POINT ASIDE, THAT LETTER DOES NOT REFERENCE
19 PLAINTIFF'S TRADEMARK. IT REFERENCES TWO GAMES CALLED FREE KICK
20 LEGENDS AND FREE KICK CARNIVAL. NEITHER OF THOSE GAMES IS AT
21 ISSUE IN THIS CASE.

22 NEITHER OF THOSE GAMES USES THE FREE KICK MASTER TRADEMARK.
23 IT'S THOSE THREE WORDS THAT MAKE UP THE TRADEMARK. NOR IS IT
24 REALLY CONCEIVABLE THAT EITHER OF THOSE GAMES WOULD INFRINGE THE
25 MARK, GIVEN THE UBIQUITOUS AND GENERIC USE OF THE TERM "FREE

1 KICK." VIRTUALLY IMPOSSIBLE TO BELIEVE THAT THAT COULD EVEN BE A
2 TRADEMARK.

3 AND THERE'S NO CLAIM THAT AND NO ALLEGATION AT ALL ONE WAY
4 OR ANOTHER WITH RESPECT TO WHETHER THOSE GAMES ARE STILL
5 AVAILABLE, WHAT HAPPENED IN RESPONSE TO THE LETTER, WHETHER THE
6 GAMES WERE TAKEN DOWN, WHETHER SAMSUNG EVEN HAD THE ABILITY TO
7 TAKE THE GAMES DOWN.

8 BUT LEAVING ALL THAT ASIDE, THEY SIMPLY DON'T USE
9 PLAINTIFF'S TRADEMARK AND, THEREFORE, THE LETTER IS ESSENTIALLY
10 IRRELEVANT TO THE ISSUES BEFORE THIS COURT.

11 **THE COURT:** ALL RIGHT. THANK YOU.

12 **MR. PAGE:** THANK YOU, YOUR HONOR.

13 **THE COURT:** ALL RIGHT. RESPONSE.

14 **MR. ALKANA:** GOOD MORNING, YOUR HONOR.

15 **THE COURT:** GOOD MORNING.

16 **MR. ALKANA:** EUGENE ALKANA.

17 IN CONNECTION WITH THE MOTION TO DISMISS BY SAMSUNG, I THINK
18 IT'S PRETTY CLEAR FROM THE DISCUSSIONS THAT SAMSUNG OCCUPIES A
19 DIFFERENT POSITION THAN BOTH GOGGLE AND AMAZON IN THE SENSE THAT
20 FREE KICK MASTERS DID PROVIDE A NOTICE CONCERNING A POTENTIAL
21 INFRINGEMENT IN 2011. THAT WAS JUST AN EXAMPLE OF THE
22 COMMUNICATIONS BETWEEN FREE KICK MASTERS AND SAMSUNG. THERE WERE
23 OTHER COMMUNICATIONS WHICH WERE NOT ATTACHED TO THE COMPLAINT BUT
24 FOR PURPOSES OF THE COMPLAINT --

25 **THE COURT:** SO WHY DID YOU SELECT THAT EXAMPLE THAT'S

1 IRRELEVANT TO THE TRADEMARK AT ISSUE HERE?

2 **MR. ALKANA:** BECAUSE THAT AT THE TIME WAS THE MOST
3 EASIEST AND MOST AVAILABLE DOCUMENT TO SHOW THAT THERE WAS A
4 DEMAND UPON THE DEFENDANT SAMSUNG TO CEASE THE USE OF THE FREE
5 KICK MASTERS.

6 **THE COURT:** WERE THERE OTHER SIMILAR DEMANDS?

7 **MR. ALKANA:** THERE ARE OTHER TEXT MESSAGES. I DON'T
8 KNOW THAT THERE'S ANOTHER LETTER OF THE SAME VEIN, BUT I KNOW
9 THERE'S OTHER COMMUNICATIONS.

10 **THE COURT:** AND ARE THERE COMMUNICATIONS THAT DEAL
11 SPECIFICALLY WITH THE TRADEMARK AT ISSUE HERE?

12 **MR. ALKANA:** YES, THERE ARE. SO I THINK IN TERMS OF
13 THE KNOWLEDGE ISSUE I THINK THAT THE PLAINTIFF SHOULD BE GRANTED
14 LEAVE TO AMEND. IT SEEMS THAT THE KNOWLEDGE IS THE PRIMARY ISSUE
15 IN THIS CASE, IN TERMS OF A CLAIM FOR CONTRIBUTORY LIABILITY.

16 **THE COURT:** AND THE CLAIM IS FOR CONTRIBUTORY
17 LIABILITY?

18 **MR. ALKANA:** NO. NO. I THINK THAT THE PLAINTIFF COULD
19 STATE A CLAIM FOR CONTRIBUTORY LIABILITY.

20 **THE COURT:** IS THE CLAIM AS STATED ONE FOR DIRECT
21 LIABILITY?

22 **MR. ALKANA:** IT IS.

23 **THE COURT:** AGAINST ALL THE DEFENDANTS.

24 **MR. ALKANA:** THE WAY IT'S PLED? YES.

25 **THE COURT:** AGAINST ALL THE DEFENDANTS.

1 **MR. ALKANA:** YES.

2 **THE COURT:** OKAY. SO THERE IS NO ALLEGATION OF
3 CONTRIBUTORY INFRINGEMENT.

4 **MR. ALKANA:** NOT IN THE COMPLAINT.

5 **THE COURT:** WHICH COUNSEL FOR GOGGLE AND AMAZON HAS
6 SAID HE INFERRED FROM THE LANGUAGE BECAUSE THERE COULD BE NO
7 DIRECT INFRINGEMENT.

8 **MR. ALKANA:** I DON'T AGREE WITH THE FACT THAT
9 COUNSEL -- WITH COUNSEL'S ASSESSMENT THAT THERE COULD BE NO
10 DIRECT INFRINGEMENT. I THINK IN THIS PARTICULAR CASE AS TO
11 SAMSUNG, SAMSUNG WAS ADVERTISING A FREE PHONE -- A PHONE --
12 SAMSUNG WAS ADVERTISING A PHONE THAT COULD PLAY THE FREE KICK
13 MASTERS APP. SO I THINK THAT THERE IS A CLAIM FOR DIRECT
14 INFRINGEMENT. SO I DON'T AGREE WITH COUNSEL THAT THERE CANNOT BE
15 A DIRECT INFRINGEMENT CLAIM.

16 I THINK IN ADDITION THERETO I THINK PLAINTIFF SHOULD BE
17 GRANTED LEAVE TO AMEND TO STATE A CONTRIBUTORY LIABILITY THEORY.

18 **THE COURT:** OKAY. WHICH YOU HAVE NOT ASSERTED?

19 **MR. ALKANA:** MY READING OF THE COMPLAINT IS NO, IT'S
20 NOT BEEN ASSERTED.

21 **THE COURT:** OKAY.

22 **MR. ALKANA:** I THINK A FAIR READING OF THE COMPLAINT IS
23 THAT THEY ARE ALL DIRECT INFRINGEMENT CLAIMS.

24 **THE COURT:** IS THAT WHAT WAS INTENDED?

25 **MR. ALKANA:** YES.

1 **THE COURT:** OKAY. ALL RIGHT. IS THERE ANYTHING ELSE?

2 **MR. ALKANA:** NO. I DON'T THINK THERE'S ANY REAL HARM
3 TO THE DEFENDANT IN THIS CASE IF THE PLAINTIFF IS GIVEN ANOTHER
4 CHANCE TO AMEND. THIS IS THE FIRST HEARING ON THE MOTION TO
5 DISMISS. THERE HAS BEEN OBVIOUSLY PRIOR PLEADINGS, BUT IN TERMS
6 OF THE ASSERTIONS BY THE PLAINTIFF I THINK THE PLAINTIFF'S CLAIMS
7 CAN BE STATED.

8 I THINK THE PLAINTIFF'S CLAIMS ARE MERITORIOUS. I THINK THE
9 PLAINTIFF'S CLAIMS ARE SUBSTANTIAL.

10 **THE COURT:** AND AS TO SAMSUNG WHAT WOULD AN AMENDED
11 COMPLAINT ASSERT?

12 **MR. ALKANA:** WELL, IT WOULD BE FAR MORE SPECIFIC IN
13 TERMS OF OUR CONTENTIONS WITH REGARD TO DIRECT INFRINGEMENT
14 BECAUSE I THINK THAT THERE IS A DIRECT INFRINGEMENT CLAIM. AND
15 AS TO CONTRIBUTORY INFRINGEMENT, IT WOULD BE FAR MORE DIRECT IN
16 TERMS OF THE NOTICE.

17 **THE COURT:** SO YOU WOULD LIKE LEAVE TO ADD A CLAIM FOR
18 CONTRIBUTORY INFRINGEMENT.

19 **MR. ALKANA:** I WOULD, YES.

20 **THE COURT:** BECAUSE, AS YOU SAID, IT DOES NOT CLEARLY
21 ASSERT ONE NOW.

22 **MR. ALKANA:** YES, THAT'S CORRECT, YOUR HONOR.

23 **THE COURT:** OKAY. AND AS TO THE DEFENDANTS' KNOWLEDGE,
24 WHAT ADDITIONAL INFORMATION WOULD YOU ADD?

25 **MR. ALKANA:** I WOULD GO BACK AND OBTAIN THE E-MAILS, OR

1 EXCUSE ME, THE PRIOR COMMUNICATIONS TO ATTACH THOSE AS EXHIBITS.

2 **THE COURT:** ALL RIGHT.

3 **MR. ALKANA:** THANK YOU, YOUR HONOR.

4 **THE COURT:** IS THERE ANYTHING ELSE? DID YOU WISH TO
5 RESPOND?

6 **MR. ULIN:** VERY BRIEFLY, YOUR HONOR. WITH RESPECT TO
7 GOING BACK AND GETTING ADDITIONAL EXHIBITS AND INFORMATION THIS
8 IS EXACTLY WHAT THEY TOLD JUDGE NEUGENT MONTHS AGO. AND THEN
9 THEY CAME FORWARD WITH HIS SECOND-AMENDED COMPLAINT. AND THEN,
10 IN RESPONSE TO THIS MOTION TO DISMISS THEY CAME FORWARD WITH
11 ADDITIONAL EXHIBITS, NONE OF WHICH ESTABLISHED EITHER DIRECT
12 LIABILITY OR CONTRIBUTORY TRADEMARK INFRINGEMENT FOR SAMSUNG,
13 FAILING TO ESTABLISH EITHER OUR USE OF THE MARK, OR TO ESTABLISH
14 THE REQUISITE KNOWLEDGE AND CONTROL, OR TO SUBSTANTIATE AN
15 ALLEGATION OF THOSE ELEMENTS THAT ARE ESSENTIAL TO SECONDARY
16 TRADEMARK INFRINGEMENT.

17 JUST TWO QUICK POINTS. ONE WITH RESPECT TO THE 2011 LETTER,
18 WHICH IS NOW BEEN CITED AS JUST AN EXAMPLE OF COMMUNICATIONS,
19 WHAT IT APPEARS PLAINTIFF IS SUGGESTING IS THAT THERE'S SOME SORT
20 OF GENERALIZED NOTICE GIVEN TO SAMSUNG WITH RESPECT TO THE
21 EXISTENCE OF INFRINGING GAMES OUT THERE IN THE MARKETPLACE, WHICH
22 IS EXACTLY WHAT PERFECT TEN AND TIFFANY VERSUS EBAY SAID IS NOT
23 SUFFICIENT TO STATE A CLAIM FOR CONTRIBUTORY TRADEMARK LIABILITY.

24 AND THEN, SECONDLY, WITH RESPECT TO THE QUESTION OF WHETHER
25 SAMSUNG ADVERTISED A PHONE THAT COULD PLAY THE FREE KICK MASTER

1 APP, FIRST OF ALL I'M NOT QUITE SURE WHAT THAT MEANS. I'M SURE
2 WE ADVERTISED PHONES AND DEVICES. YOU KNOW, WHETHER THERE'S AN
3 ALLEGATION THAT THOSE ADVERTISEMENTS ACTUALLY CONTAINED REFERENCE
4 TO FREE KICK MASTER, THERE CERTAINLY HASN'T BEEN ANY THAT HAS
5 BEEN MADE THUS FAR, AND THERE'S BEEN NOTHING THAT HAS BEEN PUT
6 FORWARD IN CONNECTION WITH THE MOTIONS OR ATTACHED TO THE PRIOR
7 COMPLAINTS THAT WOULD SUBSTANTIATE THAT ALLEGATION.

8 IN FACT, THE ALLEGATION IN THE COMPLAINT THAT SUGGESTS THAT
9 THERE HAS BEEN ADVERTISEMENT BY SAMSUNG OF FREE KICK MASTER GAMES
10 IS MADE WITH SPECIFIC REFERENCE TO EXHIBIT EIGHT TO THE
11 COMPLAINT, WHICH PLAINTIFF ACKNOWLEDGES IS A THIRD-PARTY WEBSITE
12 TOTALLY UNASSOCIATED WITH SAMSUNG.

13 SO THE VERY DOCUMENTS THAT THE PLAINTIFF HAS PUT BEFORE THE
14 COURT IN CONNECTION WITH ITS COMPLAINT AND WITH THIS MOTION BELIE
15 THAT CLAIM AND THE CLAIM THAT IT COULD POSSIBLY SUSTAIN AN
16 AMENDMENT THAT WOULD BE VALID.

17 **THE COURT:** OKAY. ALL RIGHT.

18 **MR. PAGE:** THANK YOU.

19 **THE COURT:** ALL RIGHT. MATTER STANDS SUBMITTED.

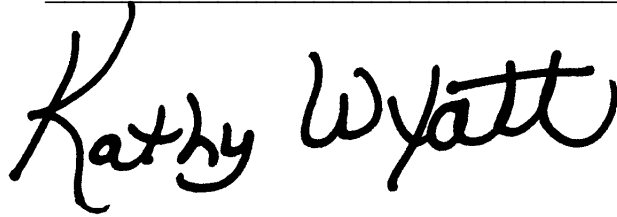
20 (THEREUPON, THIS HEARING WAS CONCLUDED.)
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1 STENOGRAPHY CERTIFICATION

2 "I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
3 FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER."

4 NOVEMBER 17, 2015

5 KATHERINE WYATT

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